Sepang International Circuit Sdn Bhd v M7 Racing Sdn Bhd

HIGH COURT (JOHOR BAHRU) — SUIT NO JA–22NCC–2–01 OF 2019
EVROL MARIETTE PETERS JC
20 APRIL 2020

Contract Law — Agreement — Sponsorship agreement — Plaintiff claimed for payment of balance sum under sponsorship agreements with defendant — Whether defendant estopped from denying debt owed — Whether payment of RM300,000 by defendant was commitment fee — Whether both sponsorship agreements void — Whether plaintiff exerted undue influence over defendant of signed both agreements — Whether entire agreement clause was bar to plaintiffs' claim — Whether plaintiff breached both agreements — Whether sponsorship agreements not relevant as not specifically pleaded by plaintiff

The plaintiff was a company that operated, managed and organised the Sepang F1 Circuit including the race team Moto3 that races under the team name 'SIC Racing Team'. The plaintiff's claim was for payment of the balance sum of RM3,320,000 pursuant to a 2016 sponsorship agreement ('the 2016 sponsorship agreement'). The defendant's counterclaim against the plaintiff was for the return of the amount of RM650,000 paid by the defendant pursuant to two agreements, namely the 2016 sponsorship agreement as well as the 2015 sponsorship agreement, both of which it claimed were void. The plaintiff's narrative began in 2014, when the defendant expressed an intention to promote its brand name and logo with the SIC Racing Team and to benefit from various other promotional and marketing opportunities as an official partner of the SIC Racing Team. The plaintiff claimed that for a total consideration fee of EUD2,0025,000, the defendant had agreed to become the official partner and sponsor for the 2015 race season, with the option to renew the sponsorship for a further two seasons. The defendant, however, had delayed in responding to the draft sponsorship agreement. Since the plaintiff had already commenced performance of its obligations, the defendant proceeded to pay an initial sum of RM300,000 on 8 July 2015 as a commitment fee towards the plaintiff's racing team programme. The defendant requested to defer payment to 31 December 2015 and consequently to extend the sponsorship to the 2016 race season. The defendant then proposed a reduction of the sponsorship fee for both the 2015 and 2016 race seasons, which further delayed the signing of both agreements. As a result of the renegotiations, caused by the delay on the part of the defendant to make payment, the parties had agreed to treat the 2015 race season as an incentive year for a nominal fee of RM1, with the sum of RM300,000 paid in July 2015 as part payment towards the agreed fee. The agreed fee was to be paid by the defendant, with monthly

instalments payable from October 2016–December 2019. The defendant made sporadic payment throughout November 2016–January 2018 in the total amount of RM350,000. A final amount of RM30,000 was made on 25 July 2018, after the defendant had proposed to reschedule the instalment payments. The plaintiff further claimed that all the allegations by the defendant were without basis and were manufactured solely for the purpose of the trial. The issues were: (a) whether the defendant was estopped from denying the debt owed; (b) whether payment of RM300,000 by the defendant was a commitment fee; (c) whether both sponsorship agreements were void; (d) whether the plaintiff exerted undue influence over the defendant of signed both agreement; (e) whether the entire agreement clause was a bar to the plaintiffs' claim; and (f) whether the plaintiff had breached both agreements by affixing onto the motorcycle for the races, the 100PLUS logo which belonged to a product that was a competitor to the defendant's sponsor product, Drive M7. The defendant also contended that neither 2015 sponsorship agreement nor the 2016 sponsorship was specifically pleaded by the plaintiff.

Held, allowing plaintiff's claim and dismissing defendant's counterclaim with costs of RM25,000 subject to allocator fee:

(1) It was undisputed that the defendant had proposed to reschedule the instalment and had even made payment of RM30,000 in July 2018 towards the agreed fee, as part of their commitment towards the revised instalments payments, while still negotiating with the plaintiff on payment timelines. The email amounted to an admission to the payment due to the plaintiff and was relevant and admissible by virtue of s 21 of the Evidence Act 1950. The correspondence did not indicate its content were made without prejudice or that the parties had in any way agreed, either expressly or impliedly for such correspondence to be excluded as evidence. The admission amounted to estoppel on the part of the defendant from denying the plaintiff's claim (see paras 16–17 & 19).

(2) Based on the documents, there was nothing to show that the amount of RM300,000 was paid solely towards the 2015 sponsorship term. All the evidence pointed to RM300,000 was the first payment and commitment shown by the defendant for the participation in the plaintiff's racing team programme. The clauses were no doubt indicative that although the sum of RM300,000 was paid by the defendant to the plaintiff on 8 July 2015, it was on the basis that the same was applied towards initial payment of the agreed fee under the 2016 sponsorship agreement. The defendant's version of the events was an afterthought designed to renege on its obligation to pay the balance sum of RM3,320,000 in compliance with the terms of the 2016 sponsorship agreement (see paras 22 & 28–29).

(3) The court was of view that the claims of dates made were prior to the date of signing were unfounded as the anomalies in the dates were due to the delay caused by the defendant itself in signing both agreements. A binding contract had already come into existence between the parties in 2017 and the signing of both agreements in 2017 by the parties was merely a matter of formality, without affecting its validity and enforceability. The right of the plaintiff to seek payment from the defendant had not been prejudiced since the debt had been admitted by the defendant and the plaintiff had already performed its part of the bargain at the time of signing the agreements. It would be unequitable and unjust for the defendant, after having reaped the benefits of the 2016 race season to claim both agreements were void for uncertainty (see paras 32 & 37).

(4) In order to establish undue influence, the elements of: (a) one of the parties was in position to dominate the will of the other party; (b) the party in a position to dominate had used that position to influence the other party; and (c) the dominant party obtained unfair advantage as a consequence, must be present. None of the elements were present. Since the issue of undue influence was raised by the defendant, it had the legal burden to prove that fact on a balance of probabilities as provided in s 103 of the Evidence Act. The defendant had failed to adduce evidence that was sufficient to discharge its legal burden to prove the vitiating factor on balance of probabilities (see paras 46, 48, 50 & 52).

(5) The plaintiff was not seeking to add, vary or suggest any collateral contract in existence. In fact, the evidence relating to the pre-contractual statements were adduced merely to explain the rationale for signing the agreements in 2017. There was no modification to or variations of the terms of both agreements. The defendant's argument on the entire agreement clause must fail (see para 55).

(6) The defendant's submission was flawed, in light of the undisputed fact that the 100PLUS logo were displayed on the motorcycle in MotoGP events for three races in 2015 held in Japan, Aragon and Australia, not in Malaysia. Both agreements were not breached as the events were not organised by the plaintiff. No complaint was ever lodged by the defendant with the plaintiff and the defendant had failed to prove the losses alleged. The defendant's counterclaim was therefore unsubstantiated and was an afterthought (see paras 59–60).

(7) The defendant's contention was untenable in view of the finding of fact that the terms of the agreement between the plaintiff and defendant were finalised in 2016 and documented in the 2016 sponsorship agreement, but signed only in 2017 due to the defendant's delay. As the plaintiff's claim was concerned only with payments due, hence reference not to the 2015 sponsorship agreement, but specifically to the 2016 sponsorship

agreement, in particular Schedule 4, in which the payment terms were detailed. There was neither confusion nor bafflement with regard to the defendant's' obligation to make payment for the benefits it reaped to the 2016 sponsorship agreement (see para 62).

[Bahasa Malaysia summary

Plaintif adalah syarikat yang mengendalikan, mengurus dan menganjurkan Sepang F1 Circuit termasuk pasukan perlumbaan Moto3 yang berlumba di bawah nama pasukan 'SIC Racing Team'. Tuntutan plaintif adalah untuk pembayaran sejumlah baki RM3,320,000 berdasarkan perjanjian penajaan 2016 ('perjanjian penajaan 2016'). Tuntutan balas defendan terhadap plaintif adalah untuk mengembalikan sejumlah RM650,000 yang dibayar oleh defendan berdasarkan dua perjanjian, iaitu perjanjian penajaan 2016 dan juga perjanjian penajaan 2015, yang keduanya tuntut sebagai tidak sah. Naratif plaintif bermula pada tahun 2014, ketika defendan menyatakan niat untuk mempromosikan jenama dan logo dengan SIC Racing Team dan untuk memanfaatkan pelbagai peluang untuk promosi dan pemasaran lain sebagai rakan rasmi SIC Racing Team. Plaintif mendakwa bahawa dengan bayaran sebanyak EUD2,0025,000, defendan telah bersetuju untuk menjadi rakan kongsi dan penaja rasmi untuk musim perlumbaan 2015, dengan pilihan untuk memperbaharui penajaan selama dua musim lagi. Namun, defendan menangguhkan respon terhadap draf perjanjian penajaan. Oleh kerana plaintif telah memulakan pelaksanaan obligasinya, defendan membayar bayaran awal sebanyak RM300,000 pada 8 Julai 2015 sebagai fi komitmen terhadap program pasukan perlumbaan plaintif. Defendan meminta untuk menangguhkan pembayaran hingga 31 Disember 2015 dan seterusnya untuk melanjutkan penajaan hingga musim perlumbaan 2016. Defendan kemudian mencadangkan pengurangan fi penajaan untuk kedua-dua musim perlumbaan 2015 dan 2016, yang kemudian melambatkan penandatanganan kedua-dua perjanjian. Sebagai hasil dari rundingan semula, yang disebabkan oleh kelewatan defendan untuk melakukan pembayaran, pihak-pihak telah bersetuju untuk memperlakukan musim perlumbaan 2015 sebagai tahun insentif dengan fi nominal sebanyak RM1, dengan jumlah RM300,000 dibayar pada bulan Julai 2015 sebagai pembayaran sebahagian daripada yuran yang dipersetujui. Bayaran yang dipersetujui harus dibayar oleh defendan, dengan bayaran ansuran bulanan dari Oktober 2016–Disember 2019. Defendan membuat pembayaran sporadis sepanjang November 2016–Januari 2018 dengan jumlah keseluruhan RM350,000. Jumlah akhir sebanyak RM30,000 telah dibuat pada 25 Julai 2018, setelah defendan mencadangkan penjadualan semula pembayaran ansuran tersebut. Plaintif selanjutnya mendakwa bahawa semua tuduhan oleh defendan adalah tidak berasas dan direka hanya untuk tujuan perbicaraan. Isu-isunya adalah: (a) sama ada defendan diestop dari menafikan hutang yang terhutang; (b) sama ada pembayaran RM300,000 oleh defendan adalah fi komitmen; (c) sama ada kedua-dua perjanjian penajaan itu terbatal; (d) sama ada plaintif memberikan

pengaruh yang tidak wajar ke atas defendan yang menandatangani kedua-dua perjanjian tersebut; (e) sama ada keseluruhan klausa perjanjian menjadi penghalang kepada tuntutan plantif; dan (f) sama ada plaintif telah melanggar kedua-dua perjanjian dengan melekatkan pada motosikal untuk perlumbaan tersebut, logo 100PLUS milik produk yang menjadi pesaing penaja defendan produk, Drive M7. Defendan juga berhujah bahawa kedua-dua perjanjian penajaan 2015 dan penajaan 2016 tidak secara khusus diplidkan oleh plaintif.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan dengan kos RM25,000 tertakluk kepada fi alokatur:

(1) Tiada pertikaian bahawa defendan telah mengusulkan untuk menjadualkan kembali bayaran ansuran dan telah membuat pembayaran sebanyak RM30,000 pada bulan Julai 2018 untuk fi yang telah dipersetujui, sebagai sebahagian daripada komitmen mereka terhadap pembayaran ansuran yang disemak, sementara masih berunding dengan plaintif untuk tempoh masa pembayaran. Emel tersebut merangkumi akuan pembayaran kepada plaintif dan adalah relevan dan boleh diterima berdasarkan s 21 Akta Keterangan 1950. Surat-menyurat tidak menunjukkan kandungannya dibuat tanpa prejudis atau bahawa pihak-pihak dengan cara apa pun telah bersetuju, sama ada secara tersurat atau tersirat agar surat menyurat itu adalah dikecualikan sebagai bukti. Pengakuan itu dikira sebagai estopel dari pihak defendan daripada menolak tuntutan plaintif (lihat perenggan 16–17 & 19).

(2) Berdasarkan dokumen-dokumen tersebut, tiada yang menunjukkan bahawa jumlah RM300,000 telah dibayarkan hanya untuk jangka masa penajaan 2015. Semua bukti menunjukkan bahawa RM300,000 adalah pembayaran dan komitmen pertama yang ditunjukkan oleh defendan untuk penyertaan dalam program pasukan perlumbaan plaintif. Tanpa keraguan, klausa tersebut menunjukkan bahawa walaupun sejumlah RM300,000 telah dibayar oleh defendan kepada plaintif pada 8 Julai 2015, hal yang sama berlaku untuk pembayaran awal yuran yang dipersetujui di bawah perjanjian penajaan 2016. Versi peristiwa oleh defendan adalah pemikiran yang dirancang untuk mengingkari kewajibannya untuk membayar jumlah baki sebanyak RM3,320,000 dengan mematuhi syarat perjanjian penajaan 2016 (lihat perenggan 22 & 28–29).

(3) Mahkamah berpendapat bahawa tuntutan untuk tarikh-tarikh yang dibuat sebelum tarikh tandatangan tidak berasas kerana anomali pada tarikh-tarikh tersebut disebabkan oleh kelewatan yang disebabkan oleh defendan sendiri dalam menandatangani kedua-dua perjanjian tersebut. Kontrak yang mengikat telah wujud di antara kedua-dua pihak pada tahun 2017 dan tandatanganan kedua-dua perjanjian pada tahun 2017 oleh para pihak hanyalah soal memformalkan perjanjian tersebut, tanpa

menjejaskan kesahan dan pelaksanaannya. Hak plaintif untuk menuntut pembayaran dari defendan tidak diprejudis kerana hutang tersebut telah diakui oleh defendan dan plaintif telah melakukan bahagiannya semasa menandatangani perjanjian tersebut. Adalah tidak wajar dan tidak adil bagi defendan, setelah memperoleh keuntungan dari musim perlumbaan 2016 untuk menuntut kedua-dua perjanjian itu tidak sah kerana tidak ketidakpastian (lihat perenggan 32 & 37).

(4) Untuk mewujudkan pengaruh yang tidak semestinya, unsur-unsurnya adalah: (a) salah satu pihak berada dalam posisi untuk menguasai kehendak pihak lain; (b) pihak yang berada dalam posisi untuk menguasai telah menggunakan posisi itu untuk mempengaruhi pihak lain; dan (c) pihak yang dominan memperoleh keuntungan tidak adil akibat kesan daripada perkara tersebut, mesti terbukti. Tiada unsur-unsur tersebut dapat dibuktikan. Oleh kerana isu pengaruh yang tidak semestinya dibangkitkan oleh defendan, pihaknya memiliki beban pembuktian untuk membuktikan fakta tersebut pada keseimbangan kebarangkalian sebagaimana yang diperuntukkan dalam pasal s 103 Akta Keterangan. Defendan gagal mengemukakan bukti yang cukup untuk melepaskan beban pembuktian untuk membuktikan faktor yang menyebabkan keseimbangan kebarangkalian (lihat perenggan 46, 48, 50 & 52).

(5) Plantif tidak ingin menambahkan, mengubah atau mencadangkan sebarang kontrak jaminan yang ada. Bukti yang berkaitan dengan pernyataan pra-kontrak dikemukakan hanya untuk menjelaskan rasional untuk menandatangani perjanjian pada tahun 2017. Tidak ada pengubahsuaian atau perubahan syarat untuk kedua perjanjian tersebut. Hujah defendan mengenai keseluruhan klausa perjanjian haruslah dilihat gagal (lihat perenggan 55).

(6) Hujahan defendan adalah salah, berdasarkan fakta yang tidak dapat dipertikaikan bahawa logo 100PLUS dipamerkan pada motosikal dalam acara MotoGP untuk tiga perlumbaan pada tahun 2015 yang diadakan di Jepun, Aragon dan Australia dan bukanlah di Malaysia. Kedua-dua perjanjian tersebut tidak dilanggar kerana acara tersebut tidak diatur oleh plaintif. Tidak ada aduan yang diajukan oleh defendan kepada plaintif dan defendan gagal membuktikan kerugian yang didakwa. Oleh itu, tuntutan balas defendan tidak berasas dan merupakan pemikiran yang dirancang (lihat perenggan 59–60).

(7) Pernyataan defendan tidak dapat dipertahankan berdasarkan penemuan fakta bahawa syarat-syarat perjanjian antara plaintif dan defendan telah dimuktamadkan pada tahun 2016 dan didokumentasikan dalam perjanjian penajaan 2016, tetapi ditandatangani hanya pada tahun 2017 kerana kelewatan oleh defendan. Oleh kerana tuntutan plaintif hanya berkaitan dengan pembayaran yang perlu dibayar, maka ianya tidak

merujuk kepada perjanjian penajaan 2015, tetapi secara khusus kepada perjanjian penajaan 2016, khususnya Jadual 4, di mana syarat pembayaran telah diperincikan. Tidak ada kekeliruan atau kekacauan berhubungan dengan kewajiban defendan untuk melakukan pembayaran untuk manfaat yang diperoleh dari perjanjian penajaan 2016 (lihat perenggan 62).]

Cases referred to

Ahmad Shahrir bin Nazi v Nashrul Hazimie bin Ab Halim & Ors [2016] 10 MLJ 15; [2016] 5 CLJ 409, HC (refd)

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754, SC (refd)

Bombay Cotton Manufacturing Co Ltd v Raja Bahadur Shivlal Motilal LNIND 1915 BOM 23; ILR 1915 39 Bom 386, PC (refd)

Chang Yuen Yin v Chia Seng Yook & Anor [1978] 1 MLJ 201b, FC (refd)

Excelerate Technology Ltd v Cumberbatch and others [2015] EWHC 204 (QB), QBD (refd)

Guthrie Waugh Bhd v Malaippan Muthucumaru [1972] 1 MLJ 35 (refd)

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1, FC (refd)

MWE Properties Sdn Bhd v Saw Lip Kean [2011] 8 CLJ 172, CA (folld)

Macronet Sdn Bhd v RHB Bank Sdn Bhd [2002] 3 MLJ 11, HC (refd)

Menta Construction Sdn Bhd v SPM Property & Management Sdn Bhd & Anor [2017] MLJU 526; [2017] 1 LNS 675, HC (refd)

Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)

PB Securities Sdn Bhd v Autoways Holding Bhd [2000] 4 MLJ 417, CA (folld)

Polygram Records Sdn Bhd v The Search & Anor [1994] 3 MLJ 127; [1994] 3 CLJ 806, HC (refd)

RHB Bank Bhd v Singlefine (M) Sdn Bhd & Ors [2019] 11 MLJ 333, HC (refd)

Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd [1990] 2 MLJ 163; [1990] 1 CLJ 995, HC (refd)

RS & L Marine Sdn Bhd v Bras Ventures Bhd & Anor [2016] 12 MLJ 152; [2016] 9 CLJ 56, CA (folld)

South East Asia Insurance Bhd v Nasir Ibrahim [1992] 2 MLJ 355, SC (refd)

Tan Ah Kow & Anor v Tan Chaui En [2017] 6 MLJ 297; [2018] 2 CLJ 610, CA (refd)

Tenaga Nasional Bhd v Irham Niaga Sdn Bhd & Anor [2011] 1 MLJ 752, CA (folld)

Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265, CA (refd)

Teras Kimia Sdn Bhd v Kerajaan Malaysia [2014] 7 MLJ 584, HC (folld)

Trentham (G Percy) Ltd v Archital Luxfer Ltd [1993] 1 Lloyd's Rep 25, CA (refd)

Utama Merchant Bank Bhd v Dato' Mohd Nadzmi Mohd Salleh [2009] 6 CLJ 371, HC (refd)

Legislation referred to

Contracts Act 1950 ss 2(d), 16, 20, 30
Evidence Act 1950 ss 21, 23, 103

Sathya Kumardas (Koo Yin Soon with her) (Shearn Delamore & Co) for the plaintiff.
Kuthubul Zaman (Aniz Zaman with him) (Syarizad Zaman & Seah) for the defendant.

Evrol Mariette Peters JC:

THE CLAIMS

[1] The plaintiff is a company that operates, manages and organises the Sepang F1 Circuit including the race team Moto3 that races under the team name 'SIC Racing Team'. The plaintiff's claim against the defendant company was for payment of the balance sum of MYR3,320,000 pursuant to a 2016 sponsorship agreement ('the 2016 sponsorship agreement') dated 19 September 2017 (exhibited at pp 297–352 of Part B of the common bundle of documents ('CBD')).

[2] The defendant's counterclaim against the plaintiff was for the return of the amount of MYR650,000, paid by the defendant pursuant to two agreements, namely the 2016 sponsorship agreement as well as an earlier 2015 sponsorship agreement dated 1 January 2015 (exhibited at pp 243–296 of Part B of the CBD), both of which it claimed were void; and alternatively, for damages in the amount of MYR33,176,109, arising from the plaintiff's alleged breach of both agreements.

[3] I allowed the plaintiff's claim and dismissed the defendant's counterclaim for the following reasons.

THE PLAINTIFF'S CASE

[4] The plaintiff's narrative began in 2014, when the defendant expressed an intention to promote its brand name and logo with the SIC Racing Team, and to benefit from various other promotional and marketing opportunities as an official partner of the SIC Racing Team.

[5] The plaintiff claimed that for a total consideration fee of EUD2,025,000, the defendant had agreed to become the official partner and

sponsor for the 2015 race season, with the option to renew the sponsorship for a further two seasons. The defendant, however, had delayed in responding to the draft sponsorship agreement, and since the plaintiff had, by March 2015, already commenced performance of its obligations, the defendant proceeded to pay an initial sum of MYR300,000 on 8 July 2015 as a commitment fee towards the plaintiff's racing team programme, pending the signing of the 2015 and 2016 sponsorship agreements (collectively 'both agreements').

[6] The defendant requested to defer payment to 31 December 2015, and consequently to extend the sponsorship to the 2016 race season. The defendant then proposed a reduction of the sponsorship fee for both the 2015 and 2016 race seasons, which further delayed the signing of both agreements.

[7] The parties ultimately agreed to a sponsorship fee of EUD900,000 (MYR4m) ('the agreed fee'), in consideration for the following rights:

(a) team partner rights for the race season from 1 January–30 November 2016 ('the 2016 sponsorship term'); and

(b) title sponsorship of the SIC Racing Team, whereby the SIC Racing Team was to be named 'DRIVE M7 SIC RACING TEAM' for the duration of the 2016 sponsorship term.

[8] As a result of the renegotiations, caused by the delay on the part of the defendant to make payment, the parties had agreed to treat the 2015 race season as an incentive year for a nominal fee of MYR1, with the sum of MYR300,000 paid in July 2015 as part payment towards the agreed fee. Although two separate sponsorship agreements were prepared respectively for the 2015 and 2016 race seasons, the delay in payment by the defendant resulted in the signing of both agreements only in May 2017 by the plaintiff and in July 2017 by the defendant.

[9] Schedule 4 to the 2016 sponsorship agreement prescribed the manner in which the agreed fee was to be paid by the defendant, with monthly installments payable from October 2016–December 2019. The defendant, however, made sporadic payments throughout November 2016–January 2018 in the total amount of MYR350,000. A final amount of MYR30,000 was made on 25 July 2018, after the defendant had proposed to reschedule the instalment payments.

[10] The plaintiff's claim against the defendant was for failing to make payment of the balance agreed fee amounting to MYR3,320,000 due and payable, as listed in Schedule 4 to the 2016 sponsorship agreement.

[11] The plaintiff further claimed that all the allegations by the defendant were entirely without basis, and were manufactured solely for the purposes of this trial.

[12] The following were called as the plaintiff's witnesses:

(a) Eddy Rashdan bin Pir Mohd ('PW1'), the former chief financial officer of the plaintiff;

(b) Samsiah Mohd Dahari ('PW2'), the commercial legal manager of the plaintiff; and

(c) Dato' Ahmad Razlan bin Ahmad Razali ('PW3'), the chief executive officer of the plaintiff.

THE DEFENDANT'S CASE

[13] The defendant claimed that it had performed its obligation for the 2015 sponsorship agreement (which term ran from 1 January–30 November 2015) by making the payment of MYR300,000 in July 2015.

[14] The defendant further averred:

(a) that both agreements were void for uncertainty, and therefore not binding, and that the plaintiff should return the payment of MYR650,000 made by the defendant;

(b) that the terms of both agreements had expired by the time they were signed in 2017;

(c) that the plaintiff had exerted undue influence on the defendant to sign both agreements;

(d) that the entire agreement clause in both agreements prevented the plaintiff from relying on any pre-contractual statement made prior to the signing of the same; and

(e) that the plaintiff had breached both agreements by displaying the 100PLUS logo which belonged to a product that was a competitor to the defendant's sponsored product, Drive M7.

[15] The following were called as the defendant's witnesses:

(a) Royazren bin Mohamed Zan ('DW1'), the sales manager of the defendant; and

(b) Tan Boon Ling ('DW2'), the accounts manager of the defendant.

A CONTENTIONS, EVALUATION AND FINDINGS

Whether the defendant was estopped from denying the debt owed

B **[16]** It was undisputed that the defendant, by its letter dated 11 June 2018, had proposed to reschedule the instalment payments, and had even made payment of MYR30,000 in July 2018 towards the agreed fee, as part of their commitment towards the revised instalment payments, while still negotiating with the plaintiff on payment timelines. The email (exhibited at p 222 of Part B of the CBD) dated 25 July 2018 from Mahathir Ahmad, a director of the defendant, to PW3, reads:

C

> Pursuant to your earlier email, attached is the draft agreement which we have revised some of the clauses for your attention. Kindly notify us should there is further comments or else we can proceed on the signing.
>
> D *As part of our commitment on the revised settlement proposed,* we have also transferred a payment to SIC for July and August 2018 amounting to MYR30,000, which the proof of payment is also attached for your reference.
>
> Your attention on this matter is highly appreciated. We look forward to finalise the
> E agreement soon.
>
> Best regards,
>
> Mahathir Ahmad
>
> (Emphasis added.)

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[17] This email, in my view, amounts to an admission to the payment due to the plaintiff, and as such, is relevant and admissible by virtue of s 21 of the Evidence Act 1950 ('the Evidence Act'), which reads:

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> Section 21 — *Proof of admissions against persons making them and by or on their behalf*
> Admissions are relevant and may be proved as against the person who makes them or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest except in the following cases:

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[18] Counsel for the defendant contended that even if this was an admission, it was made without prejudice. I am unable to agree with this contention, in view of the fact that such admission does not fall within s 23 of the Evidence Act, to be excluded as evidence. Section 23 reads:

I

> Section 23 — *Admissions in civil cases when relevant*
>
> In civil cases no admission is relevant if it is made, either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

[19] The correspondence in the present case did not indicate that its contents were made without prejudice, or that the parties had in any way agreed, either expressly or impliedly for such correspondence to be excluded as evidence. Hence, such admission amounts to estoppel on the part of the defendant from denying the plaintiff's claim. My view is supported by the case of *Menta Construction Sdn Bhd v SPM Property & Management Sdn Bhd & Anor* [2017] MLJU 526; [2017] 1 LNS 675, where in a similar vein, the court had found that since the defendants' conduct in entering into negotiations for settlement of a debt owing to the plaintiff had led the latter to believe that it would be compensated for all the monies owing, such negotiations amounted to repeated acknowledgments of debt, which operated to estop the defendant from denying the plaintiff's claim.

[20] I am guided also by the Court of Appeal in *Tenaga Nasional Bhd v Irham Niaga Sdn Bhd & Anor* [2011] 1 MLJ 752, and *PB Securities Sdn Bhd v Autoways Holding Bhd* [2000] 4 MLJ 417 in concluding that the defendant is not allowed to approbate and reprobate, especially since the defendant had agreed to make payment, and had encouraged the plaintiff to proceed on the basis that it was accepted as a creditor. It would, therefore, be unconscionable and unjust for the defendant to now assert otherwise.

Whether payment of MYR300,000 was a commitment fee

[21] Although it was undisputed that the amount of MYR300,000 was in fact paid on 8 July 2015, the defendant insisted that such amount was paid towards the 2015 sponsorship term, and was neither a commitment fee, nor payment towards the total fee of MYR4m.

[22] Based on the documents, however, there is nothing to show that the amount of MYR300,000 was paid solely towards the 2015 sponsorship term. In fact, all the evidence points to MYR300,000 being the first payment and commitment shown by the defendant for the participation in the plaintiff's racing team programme. The defendant had even provided an undertaking via a *Letter Of Undertaking To Provide Guarantee And Indemnity On The Team Sponsorship Amount Of 'Drive M7 SIC Racing Team' For Year 2015 and 2016* dated 24 October 2016 for the entire EUD900,000 (exhibited at pp 91–99 of Part B of the CBD). The relevant part of the letter reads:

> ... we the undersigned, M7 Racing Sdn Bhd, irrevocably undertake and guarantee to SIC against EUDNine Hundred Thousand *(€900,000) under the Agreement for year 2015 and 2016* which shall fall due for payment in accordance with the agreed payment schedule stated under the Agreement ... (Emphasis added.)

[23] A perusal of the documents indicates that the plaintiff's version was the correct one. I was satisfied with, and convinced by the explanation provided by

PW1 that it was due to the defendant's own financial issues, that 2015 was treated as an incentive year, with minimal consideration of MYR1, and that the agreed fee of MYR4m would be imposed for the 2016 sponsorship term, to be paid over a period of three years from October 2016–December 2019.

[24] At this juncture, it must be borne in mind that in the Privy Council case of *Bombay Cotton Manufacturing Co Ltd v Raja Bahadur Shivlal Motilal* LNIND 1915 BOM 23; ILR 1915 39 Bom 386 (PC), it was observed by Sir George Farwell, that in reference to the cross-examination of witness, 'everything depends on the judge's belief or disbelief in the witness' story'.

[25] In this case, I found both PW1 and PW3 particularly to be forthright and consistent. They did not mince their words or evade questions. They explained the chronology of events, and anomalies in the relevant dates contained in both agreements with clarity and in detail, and their reliance on contemporaneous and independent documents, in my view, enhanced their credibility: *Excelerate Technology Ltd v Cumberbatch and others* [2015] EWHC 204 (QB). Discrepancies in their evidence, if at all, were minor, and had been reconciled during re-examination. On the whole, they were convincing in their evidence.

[26] In contrast, DW1 had contradicted himself several times, and on many occasions he had agreed with material aspects of the plaintiff's case. I was sceptical of the evidence of the defendant's witnesses, as such evidence had contradicted the documentary evidence before me, and, therefore, remained incongruous.

[27] The plaintiff's witnesses' evidence was also consistent with the express terms of the 2016 sponsorship agreement, particularly Recital B, the definition of 'Fee' under cl 1.1 and cl 7, which read:

> Recital B
>
> SIC owns and manages a Moto3 racing team which races under the team name 'SIC Racing Team' which competes in the Moto3 World Championship ('the Championship') with its 2 selected riders. The Sponsor wishes to promote the Brand Name and/ or the Brand Logo (as defined below) and to benefit from various other promotional and marketing opportunities as an official partner to SIC Racing Team in connection with the Championship (as defined above) for the Term (as defined below) and *has paid MYR300,000 (RINGGIT MALAYSIA THREE HUNDRED THOUSAND) to SIC being the initial payment of the Fee* on 8 July 2015.
>
> *****
>
> Clause 1 — *Definitions and Interpretation*

Fee: means the sum per season to be paid by the Sponsor to SIC in accordance with Clause 7

*****

Clause 7 — *Consideration*

7.1 In consideration of the grant of the right to use any of the Team Partner Rights under Clause 3 and Schedule 1 or any of the Team Marks or use any Materials or otherwise exploit any of the other rights granted to the Sponsor under this Agreement to the Sponsor, *the Sponsor shall pay to SIC the Agreed Fee of MYR4,000,000 (RINGGIT MALAYSIA FOUR MILLION ONLY) via periodic instalments in accordance with the schedule of payments as in Schedule 4* herein into SIC's Designated Account by telegraphic transfer or any other mode of payment which both parties herein may from time to time agree upon. (Emphasis added.)

[28] These clauses are no doubt indicative that although the sum of MYR300,000 was paid by the defendant to the plaintiff on 8 July 2015, it was on the basis that the same was to be applied towards initial payment of the agreed fee under the 2016 sponsorship agreement.

[29] Based on the above, it is my view that the defendant's version of the events is an afterthought designed to renege on its obligation to pay the balance sum of MYR3,320,000 in compliance with the terms of the 2016 sponsorship agreement.

Whether both agreements were void for uncertainty

[30] The defendant claimed that both agreements were void for uncertainty, as stipulated in s 30 of the Contracts Act 1950 ('the Contracts Act'), which reads:

Section 30 — *Agreements void for uncertainty*

Agreements, the meaning of which is not certain, or capable of being made certain, are void.

[31] The defendant contended that there were several provisions pertaining to term, and termination found in cll 2 and 8 respectively of the 2015 sponsorship agreement, and cll 2 and 9 respectively of the 2016 sponsorship agreement, in which reference was made to dates that were prior to the date of signing, and as such, created ambiguity and uncertainty. In fact, the defendant claimed that based on the dates stipulated, both agreements had already expired by the time the parties had signed the same in 2017.

[32] In my view, these claims are unfounded, since first and foremost, the anomalies in the dates were due to the delay caused by the defendant itself in

A signing both agreements. A binding contract had already come into existence between the parties in 2016 and the signing of both agreements in 2017 by the parties, was merely a matter of formality, without affecting its validity and enforceability.

B **[33]** Based on the Supreme Court case of *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, it is trite law that the existence of a contract depends on the intention of the parties, and not on the mere preparation of a formal contract. The absence of a formal contract does not prevent a binding contract from coming into existence.

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[34] I am guided also by the Court of Appeal in *MWE Properties Sdn Bhd v Saw Lip Kean* [2011] 8 CLJ 172 and *RS & L Marine Sdn Bhd v Bras Ventures Bhd & Anor* [2016] 12 MLJ 152; [2016] 9 CLJ 56, where the point emphasised is that if the court finds that the parties had intended to create a D legal contract between them, just by referring to the exchange of correspondences and the conduct between the parties, then the conclusion must be that there is a binding and enforceable contract between them, and that the mere fact that a written agreement had yet to be drawn up and executed E by the parties does not necessarily mean that there was no legally binding and enforceable contract between the parties at that point in time.

[35] Secondly, the 'expiry' referred to in both agreements was in relation to the expiry of the use and exploitation of the commercial rights for the F sponsorship term, which in the case of the 2016 sponsorship agreement, began on 1 January 2016 and ended on 30 November 2016. The expiry had no bearing on the defendant's obligation to make payment of the agreed fee in accordance with the payment schedule set out in Schedule 4 to the 2016 sponsorship agreement.

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[36] In any event, pursuant to cll 8.7 and 9.7 of the 2015 and 2016 sponsorship agreements respectively, 'the expiry or termination of this Agreement shall be *without prejudice to any rights which shall have already accrued* to either Party under this Agreement ...'. (Emphasis added.)

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[37] Hence, the right of the plaintiff to seek payment from the defendant had not been prejudiced, especially since the debt had been admitted to by the defendant, and the plaintiff had already performed its part of the bargain at the time of signing the agreements. It would, therefore, be inequitable and unjust I for the defendant, after having reaped the benefits of the 2016 race season, to now claim that both agreements were void for uncertainty. In fact, the defendant had, all this while, accepted the plaintiff's performance without any complaint. Accordingly, it is unrealistic and illogical for the defendant to suggest that no contract had even taken place.

[38] I am guided by the court in *Teras Kimia Sdn Bhd v Kerajaan Malaysia* [2014] 7 MLJ 584, where it was stated by Nallini Pathmanathan J (now FCJ):

> ... During negotiation, the plaintiff continued providing services for the defendant but no new contract was awarded to the plaintiff. The plaintiff claimed for remuneration for services provided during negotiation and whilst the defendant had relied on an initial letter of offer uses the word 'without commitment' to mean services were without charge (not even present here), the court held that the fact that the transaction or work was performed during the interim period is an important consideration. This is because *the fact that services was performed and accepted, makes it unrealistic to argue that there was no intention to enter into legal relations*. (Emphasis added.)

[39] Reference is also made to *Trentham (G Percy) Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25, where it was stated by Steyn LJ that 'the fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty'.

[40] The defendant had relied on the cases of *Chang Yuen Yin v Chia Seng Yook & Anor* [1978] 1 MLJ 201b, *Ahmad Shahrir bin Nazi v Nashrul Hazimie bin Ab Halim & Ors* [2016] 10 MLJ 15; [2016] 5 CLJ 409 and *Tan Ah Kow & Anor v Tan Chaui En* [2017] 6 MLJ 297; [2018] 2 CLJ 610, to submit that both agreements were void for uncertainty. However the uncertainty in those cases was with regard to the subject matter of the contract, unlike the present case, where the anomalies were merely in the dates which stemmed from the delay in signing both agreements, attributed to the defendant itself. In fact, the defendant's line of argument would lead undeniably to its unjust enrichment, and as a result, a severe imbalance between the parties.

[41] I agreed with the plaintiff's argument that even if the suggestion was that the performance in 2016 was 'past consideration' for the agreements signed in 2017, the legal position is past consideration constitutes good consideration as stipulated in s 2(d) of the Contracts Act, which reads:

> Section 2 — *Interpretation*
>
> (d) when, at the desire of the promisor, the promisee or any other person *has done or abstained from doing*, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise; (Emphasis added.)

[42] The concept of 'past consideration' was also explained in *Guthrie Waugh Bhd v Malaippan Muthucumaru* [1972] 1 MLJ 35 and *South East Asia Insurance Bhd v Nasir Ibrahim* [1992] 2 MLJ 355. In my view, therefore, there is no room to argue that the plaintiff's past performance of its obligation before

A the signing of both agreements in 2017 was not good consideration. The defendant's payment obligations, therefore, remained unabated.

Whether the plaintiff exerted undue influence over the defendant to sign both agreements

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[43] In claiming that the plaintiff had exerted undue influence over the defendant to sign both agreements, the defendant relied on a Whatsapp message dated 24 May 2017 (exhibited at p 1 of the defendant's additional bundle of documents) from PW3 to the defendant, which reads:

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> ... if the agreement is not signed, the board will most likely instruct management to initiate legal proceedings and classify it as bad debts. It has come to a point that I am no longer able to do anymore favours and in fact I may be reprimanded to allow this situation to happen. So please advise whether the contract can be signed by end of today ...

D

[44] 'Undue influence' is described in ss 16 and 20 of the Contracts Act. The sections read:

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> Section 16 — *Undue influence*
>
> (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

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> (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another —
>
> (a) (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
>
> (b) (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

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> 3(a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

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> (b) Nothing in this subsection shall affect section 111 of the Evidence Act 1950.

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> ...
>
> Section 20 — *Power to set aside contract induced by undue influence*
>
> When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any

such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the court may seem just.

[45] The principles pertaining to 'undue influence' have been distilled by the Court of Appeal in *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265, which was followed in several cases including *RHB Bank Bhd v Singlefine (M) Sdn Bhd & Ors* [2019] 11 MLJ 333.

[46] In order to establish undue influence, the following elements must be present:

(a) one of the parties is in a position to dominate the will of the other party;

(b) the party in a position to dominate had used that position to influence the other party; and

(c) the dominant party obtained unfair advantage as a consequence.

[47] The defendant's reliance on *Polygram Records Sdn Bhd v The Search & Anor* [1994] 3 MLJ 127; [1994] 3 CLJ 806 is misplaced, as in that case, it was stated that the relationship between the parties must be one of trust and confidence. In this case, there was not a shred of evidence to demonstrate such a relationship.

[48] In my view, none of the elements necessary to establish undue influence as a vitiating factor, were present. Although PW3 confirmed during cross-examination that he had constantly asked the defendant to sign both agreements, as he was subject to pressure from the plaintiff, that fact in itself did not amount to undue influence.

[49] Furthermore, the documentary evidence revealed prolonged negotiations by Mokhtar bin Datuk Ahmad and Mahathir bin Datuk Ahmad who are directors of the defendant; and as persons having stewardship of the defendant, they were hardly novice businessmen, to now claim that PW3 was in a position to dominate their will. It is, therefore, my finding that the defendant, through its directors who had the benefit of legal advice, had entered into both agreements willingly and voluntarily, in the absence of any form of undue influence whatsoever.

[50] Since the issue of undue influence was raised by the defendant, it had the legal burden to prove that fact on a balance of probabilities, as prescribed by s 103 of the Evidence Act, which reads:

Section 103 — *Burden of proof as to particular fact*

A

> The burden of proof *as to any particular fact* lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. (Emphasis added.)

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[51] The term 'balance of probabilities' was described in *Miller v Minister of Pensions* [1947] 2 All ER 372 by Denning J (as he then was) as 'more probable than not' and which is 'not so high as required in a criminal case ... but if the probabilities are equal, it is not discharged'. The standard, therefore, does not allow for any guesswork, speculation, surmise or conjecture. *Miller v Minister of Pensions* has been assimilated into Malaysian jurisprudence through several cases including *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1.

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[52] In my view, the defendant had failed to adduce evidence that was sufficient to discharge its legal burden to prove this vitiating factor on a balance of probabilities.

Whether the entire agreement clause was a bar to the plaintiff's claim

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[53] The defendant contended that the entire agreement clause in both agreements prevented the plaintiff from relying on any pre-contractual statement prior to signing the same, and that the plaintiff was, therefore, confined to the four corners both agreements.

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[54] Clauses 12.2 and 13.2 of the 2015 and 2016 sponsorship agreements respectively, are of the same contents and read:

> *Entire agreement*
>
> This Agreement constitutes the entire agreement and understanding of the Parties and supersedes any Pre-Contractual Statement and previous agreement, draft agreement, arrangement or understand (whether in writing or not) between the Parties relating to the subject matter of this Agreement.

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[55] Although the cases of *Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11, *Utama Merchant Bank Bhd v Dato' Mohd Nadzmi Mohd Salleh* [2009] 6 CLJ 371, and *Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163; [1990] 1 CLJ 995 which the defendant had relied upon, are useful in explaining the implications of an entire agreement clause, in this case, the plaintiff was not seeking to add, vary or suggest any collateral contract in existence. In fact, the evidence relating to the pre-contractual statements were adduced merely to explain the rationale for signing the agreements in 2017. There was no modification to or variation of the terms of

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both agreements. The defendant's argument on the entire agreement clause, therefore, must fail.

Whether the plaintiff had breached both agreements

[56] The defendant counterclaimed that the plaintiff had breached both agreements by affixing onto the motorcycle for the races, the 100PLUS logo which belonged to a product that was a competitor to the defendant's sponsored product, Drive M7.

[57] The relevant provisions are items 13 and 12 of Part D of Schedule 1 to the 2015 and 2016 sponsorship agreements respectively, which are of the same contents, and read:

> *Energy Drink and Mineral Water Supplier*
>
> The Sponsor's Brands of Energy Drink and Mineral Water shall be promoted, used and consumed exclusively *during all events organised by SIC* except for F1 and MotoGP, however SIC shall have the rights of first refusal for the entry of any other brank of energy drink and mineral water during all events except for F1 and MotoGP at the Circuit for the Term. (Emphasis added.)

[58] The defendant further claimed that as a result, it had suffered losses in the amount of MYR33,176,109, which were profits estimated to have been realised from April 2016–January 2018. The defendant contended that these losses were the result of the failure of SL Ng Trading Agency Sdn Bhd (the sole distributor of Drive M7, appointed by the defendant) to sell the product.

[59] In my view, the defendant's submission is flawed, in light of the undisputed fact that the 100PLUS logo was displayed on the motorcycle in MotoGP events for three races in 2015 held in Japan, Aragon, and Australia. It is pertinent to note that these races did not take place in Malaysia. Accordingly, both agreements were not breached, as these events were not organised by the plaintiff, as stipulated in items 13 and 12 of Part D of Schedule 1 to the 2015 and 2016 sponsorship agreements respectively.

[60] Furthermore, no complaint was ever lodged by the defendant with the plaintiff pertaining to this matter, and in any event, it is my view that the defendant had failed to prove the losses alleged. The defendant's counterclaim is, therefore, unsubstantiated, and is also in my view, an afterthought.

[61] A final point of the defendant's submission that needs to be addressed is the contention that neither the 2015 sponsorship agreement nor the 2016

A sponsorship agreement was specifically pleaded by the plaintiff, and since parties are bound by their pleadings, all evidence relating to both agreements is irrelevant.

B **[62]** In my view, this contention is untenable in view of the finding of fact that the terms of the agreement between the plaintiff and defendant were finalised in 2016, and documented in the 2016 sponsorship agreement, but signed only in 2017 due to the defendant's delay. Since the 2015 race season was treated as an incentive year for a nominal fee of MYR1, and that the plaintiff's claim was concerned only with payments due, hence reference not to
C the 2015 sponsorship agreement, but specifically to the 2016 sponsorship agreement, in particular Schedule 4, in which the payment terms were detailed. There was neither confusion nor bafflement with regard to the defendant's obligation to make payment for the benefits it reaped pursuant to the 2016 sponsorship agreement.

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CONCLUSION

[63] Based on the aforesaid reasons, and after judicious consideration of all the evidence before this court, both oral and documentary, and submissions of
E counsel for both parties, the plaintiff's claim was allowed with costs in the amount of MYR25,000 (subject to allocatur fees), whilst the defendant's counterclaim was dismissed.

F *Plaintiff's claim allowed and defendant's counterclaim dismissed with costs of RM25,000 subject to allocator fees.*

Reported by Mohd Kamarul Anwar

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